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DISTRICT COURT OF GUAM

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MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE B. SANTOS AND CHARMAINE
R. TORRES, on behalf of themselves
and a class of others similarly situated,

Petitioners,

-vs-

FELIX P. CAMACHO, Governor of
Guam; ART ILAGAN, Director of
Department of Revenue and Taxation;
LOURDES M. PEREZ, Director of
Department of Administration; and,
GOVERNMENT OF GUAM,

Respondents.

CIVIL CASE NOS. 04-00006 and 04-00038

**JOINT MOTION OF THE PETITIONERS
IN SANTOS AND TORRES FOR FINAL
CERTIFICATION OF THE EIC CLASS
FOR SETTLEMENT PURPOSES**

[ORAL ARGUMENT REQUESTED]

MOTION

Julie B. Santos, Petitioner in CV04-00006, individually and on behalf of all those similarly situated (hereinafter "EIC Class"), through her attorneys of record Phillips and Bordallo, P.C., by Interim Class Counsel Michael F. Phillips; and Charmaine R. Torres, Petitioner in CV04-00038, through her attorneys of record Lujan Aguigui & Perez LLP, by Peter C. Perez; ") submit this Joint Motion for Final Certification of the EIC Class for Settlement Purposes. The moving parties base this Motion on the Memorandum of Points and Authorities filed concurrently herewith, the record before the Court, and all other arguments and evidence this Court may otherwise permit.

Respectfully submitted this 8 day of June, 2007.

PHILLIPS & BORDALLO, P.C.
Interim Class Counsel & Attorneys for
Petitioner Julie Babauta Santos

By: 
MICHAEL F. PHILLIPS

LUJAN AGUIGUI & PEREZ LLP
Attorneys for Plaintiff Charmaine R.
Torres

By: 
PETER C. PEREZ

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The Petitioners in the Santos and Torres actions respectfully submit this
4 Memorandum of Points and Authorities in support of their Joint Motion for Final
5 Certification of the EIC Class for Settlement Purposes.
6

7 As provided in the Settlement Agreement, the Joint Motion for Preliminary
8 Approval and the Joint Petition for Final Approval, Petitioners Santos and Torres move
9 for final certification of the EIC class, to be defined as follows:

10 All persons who do not elect to request exclusion from the class
11 under the procedures described below and: (1) were subject to the
12 Guam Territorial Income Tax ("GTIT") established in 48 U.S.C. §
13 1421i for tax years 1995-1996 and/or 1999-2004 and would have
14 been eligible to file for the EIC established in 26 U.S.C. § 32 (as it
15 applied in each respective tax year) if that program were applied in
16 the Territory of Guam, and filed a timely tax return for the applicable
17 tax year or year(s) in which the credit is sought; and/or (2) were
18 eligible to receive an EIC credit under certain Guam territorial laws
19 for tax years 1995-1996 and/or 1999-2004 that mirrored the federal
20 EIC law (26 U.S.C. § 32), including the Guam Earned Income
Program (Chapter 42 of 11 G.C.A.), and filed a timely tax return for
the applicable tax year or year(s) in which the credit is sought;
and/or (3) actually filed a claim for the EIC with DRT for tax year
1998 under the GTIT or Guam Earned Income Program (Chapter 42
of 11 G.C.A.) on or before April 15, 2002, and have not yet received
full payment for that claim; and/or (4) actually filed a claim for the
EIC with DRT for tax year 1997 under the GTIT or Guam Earned
Income Program (Chapter 42 of 11 G.C.A.) on or before April 16,
2001 and have not yet received full payment for that claim.

21 As discussed below, because (1) the EIC class represented by the Petitioners is
22 so numerous such that joinder of each member of the class is impractical, (2) there are
23 common questions of law and fact common to the class, (3) the Petitioners' claims are
24 typical of the claims of the class members, and (4) the Petitioners can and will fairly and
25 adequately protect the interests of the class, final certification is appropriate in this case.
26
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1 A class action is superior to other available methods for the fair and efficient
2 adjudication of this controversy. The prosecution of separate actions by individual
3 members of the class would create a risk of inconsistent or varying adjudications with
4 respect to individual members of the class which would establish incompatible standards
5 of conduct for the parties opposing the class. The acts or omissions complained of in the
6 Joint Petition are applicable generally to the class thereby making appropriate final relief
7 with respect to the class as a whole. Furthermore, adjudications with respect to
8 individual members of the class would as a practical matter be dispositive of the interests
9 of the other members not parties to the adjudication or substantially impair or impede
10 their ability to protect their interests.
11

12 As set forth in further detail below, Petitioners submit that the requirements for
13 final certification of the EIC class for settlement purposes have been met.
14

15 **SUMMARY OF THE LITIGATION**

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17 The Court already is familiar with the lengthy history of this litigation, initiated first
18 with the Santos action in February 2004, followed by the Torres action in August 2004,
19 and then the (non-settling) Simpao action in December 2004. This litigation involves the
20 Government of Guam's alleged non-payment of Earned Income Tax Credits to eligible
21 Guam taxpayers.
22

23 The Court consolidated the cases for pretrial purposes in March 2006, and
24 granted the Governor of Guam's request for mediation under Local Rule 16.6. See
25 Order Re: Settlement Conference Pursuant to Local Rule 16.6 (March 21, 2006). The
26 parties agreed on a mediator and engaged in mediation; however, only parties to the
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1 Santos and Torres actions were able to successfully reach a settlement, which then
2 resulted in execution of the Settlement Agreement now being presented to the Court.

3 Prior to the execution of the instant Settlement Agreement, two prior settlement
4 agreements were entered into in the Santos action, one in 2004, the other in 2005.
5 Compared to the settlement reached in the Santos case on June 20, 2005 (the "2005
6 Settlement Agreement"), the instant Settlement Agreement involves parties to both the
7 Santos and Torres actions. It was the result of mediation held in Guam over three (3) full
8 days, from April 6-8, 2006, before a distinguished JAMS mediator, the Hon. William J.
9 Cahill. The agreement enlarges the putative class that will benefit from the settlement
10 while providing enhanced benefits to the putative class compared to the benefits
11 provided for under the 2005 Settlement Agreement.
12

13
14 On May 26, 2006 the parties submitted the instant Settlement Agreement to the
15 Court. In addition the parties submitted, *inter alia*, a Joint Petition for Declaratory and
16 Injunctive Relief, and/or for Recovery of Earned Income Tax Credits, or in the Alternative
17 for a Writ in the Nature of Mandamus.

18 The class Petitioners seek to certify is believed to consist of more than twenty
19 thousand (20,000) taxpayers entitled to and qualified to receive EIC. Total Earned
20 Income Credit Claims to date number over fifty-three thousand (53,000). The Petitioners
21 and each EIC Class Member were denied the full implementation of the earned income
22 tax credit as applied to Guam, including the Government's prohibition or prevention of
23 EIC class members to file claims for earned income tax refunds, and/or the
24 Government's denial or failure to pay earned income tax credits to otherwise qualified
25 Guam taxpayers. No conflicts of interest exist between the Petitioners and the EIC class
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27

1 members. Petitioners have vigorously pursued this action on behalf of themselves and
2 the EIC class members. Petitioners request that the Court grant final certification of the
3 EIC class for settlement purposes.

4 **ARGUMENTS SUPPORTING FINAL CERTIFICATION OF THE EIC CLASS**
5 **FOR SETTLEMENT PURPOSES**

6
7 Certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure,
8 which sets forth a two step procedure for certifying a class. First, the party seeking to
9 certify the class must make a prima facie showing of each of the requirements of Rule
10 23(a): numerosity, commonality, typicality, and adequacy. Blackie v. Barrack, 524 F.2d
11 891, 901 (9th Cir. 1975). Rule 23(a) of the Federal Rules of Civil Procedure states:

12
13 One or more members of a class may sue or be sued as
14 representative parties on behalf of all only if (1) the class is
15 so numerous that joinder of all members is impracticable, (2)
16 there are questions of law and fact common to the class, (3)
17 the claims or defenses of the representative parties are
18 typical of the claims or defenses of the class, and (4) the
19 representative parties will fairly and adequately protect the
20 interests of the class.

21 Once these four requirements are met, a plaintiff must show that the lawsuit
22 qualifies for class action status under one of the possibilities in found in Rule 23(b). In re
23 Methionine Antitrust Litigation, 204 F.R.D. 161, 163 (2001). Rule 23(b) states:

24 An action may be maintained as a class action if the
25 prerequisites of subdivision (a) are satisfied, and, in addition:
26 (1) the prosecution of separate actions by or against
27 individual members of the class would create a risk of (A)
inconsistent or varying adjudications with respect to
individual members of the class which would establish
incompatible standards of conduct for the party opposing the
class, or (B) adjudications with respect to individual
members of the class would as a practical matter be

dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or, (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy...

In ruling on a motion for class certification, the substantive allegations in a plaintiff's complaint must be accepted as true. Blackie v. Barrack, 524 F.2d 891, 901 n. 7 (9th Cir 1975). The court may not consider the merits of plaintiff's case in determining the certification motion. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Rather, the only issue on point for class certification is whether plaintiffs assert a claim which, assuming its merit, satisfies the requirements of Rule 23. *Id.* at 178.

On January 23, 2007, the Court conditionally certified the EIC class, finding at that time that the class had met the requirements of law. The circumstances as they exist today, months following the Court's conditional certification of the EIC class, demonstrate even further that the class Petitioners seek final certification for satisfies the requirements of Rule 23.

1 **A. Rule 23(a) criteria**

2 **NUMEROSITY**

3
4 The first prerequisite is that the class is so numerous that joinder of all
5 members would be impracticable. Plaintiffs need not, however, allege the precise
6 number or identity of class members for class certification. Rather, a finding of
7 numerosity may be supported by common sense assumptions. In re Playmobil Antitrust
8 Litigation, 35 F.Supp.2d 231, 239 (E.D.N.Y.1998). The exact number of class members
9 required for certification of a class has not been defined. A class with more than forty
10 members is generally sufficiently numerous that joinder is considered impracticable.
11 Paper Systems, Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 604 (E.D. Wis. 2000). Classes
12 numbering in the hundreds have routinely satisfied the numerosity requirement. In re Flat
13 Glass Antitrust Litigation, 191 F.R.D. 472 (E.D. Pa. 1999).

14
15 At the time of the hearing on the Conditional Certification of the Class, the
16 EIC class was believed to consist of more than ten thousand (10,000) taxpayers entitled
17 to and qualified to receive earned income tax credits. The Court found that joining that
18 number of petitioners would be impracticable. To date, over 54,000 claims have been
19 filed by eligible members. The class Petitioners seek to certify is so numerous such that
20 joinder of each member of the class as it exists today is impracticable.

21
22 **COMMONALITY**

23
24 The second prerequisite for class certification is that there are questions of
25 law or fact common to the class. The requirement that common questions of law or fact
26 exist among class members is satisfied if the named plaintiffs share at least one
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1 question of fact or law with the grievances of the class. In re Flat Glass Antitrust
2 Litigation, 191 F.R.D. 472, 478 (E.D. Pa. 1999). Petitioners and each EIC class member
3 have been denied the full implementation of the earned income tax program as applied
4 on Guam, including the Government's prohibition or prevention of EIC class members to
5 file claims for earned income tax refunds and/or the Government's denial or failure to
6 pay earned income tax refunds to otherwise qualified Guam taxpayers. Common
7 questions of law or fact exist among the Petitioners and the EIC class members. In
8 considering conditional certification, the Court found that the single fact that "the
9 Petitioners and class members have been denied both the opportunity to file for the
10 earned income tax credit ("EIC") for several years and the recovery of the same"
11 satisfied the requirement of commonality. The circumstances with regards to this fact
12 and others has remained constant to this day. As such, the requirement of commonality
13 has been met.
14
15

16 TYPICALITY

17
18 The third prerequisite for class certification is that the claims or defenses of
19 the representative parties are typical of the claims or defenses of the class. Typicality
20 focuses on whether the individual claim of the class representatives has the essential
21 characteristics common to the claims of the class. In re Flat Glass Antitrust Litigation,
22 191 F.R.D. 472, 479 (E.D. Pa. 1999). The typicality requirement has been liberally
23 construed by the courts. Scholes v. Stone, 143 F.R.D. 181, 185 (N.D.I. 1992); Mersay v.
24 First Republic Corp., 43 F.R.D. 465, 468 (S.D.N.Y. 1968). Courts have uniformly held
25 that claims and defenses are typical if they stem from the same event, practice, or
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1 course of conduct that forms the basis for the claims of the class and are based upon the
2 same legal or remedial theory. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).
3 The purpose of the typicality requirement is to assure that the interests of the named
4 representative aligns with the interest of the class. Petitioners and each EIC class
5 member have been denied the full implementation of the earned income tax program as
6 applied on Guam, including the Government's prohibition or prevention of EIC class
7 members to file claims for earned income tax refunds and/or the Government's denial or
8 failure to pay earned income tax refunds to otherwise qualified Guam taxpayers. The
9 claims of the Petitioners are typical of the claims of the EIC class. As the Court observed
10 in its Decision and Order granting Conditional Certification,
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12
13 ...the Respondents' "course of conduct" with respect to the
14 various plaintiffs, *i.e.*, its failure to allow EIC claims and
15 subsequent payment thereof is exactly the same. In addition,
16 Petitioners' claims are also based on the same basic legal
theory as the class. Thus, it would seem that Petitioners'
claims are "typical" of those of the rest of the class.

17 The facts application to the typicality requirement are likewise unchanged between the
18 date of the Court's decision and present time. As such, Petitioners submit that the
19 Court's finding regarding the typicality requirement should apply in full force in its
20 determination regarding the instant motion.

21 ADEQUACY

22
23 The fourth prerequisite for class certification is that the representative party
24 will fairly and adequately represent the class. Parties are generally considered to be
25 adequate representatives of absent class members if there are no conflicts of interest
26 between the representatives and class members, and if the court is persuaded that
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1 counsel for the representatives will vigorously pursue the action. A class representative
2 must be part of the class and possess the same interest and suffer the same injury as
3 the class members. East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395,
4 403, 97 S.Ct. 1891, 1896 52 L.Ed.2d 706 (1974). Petitioners and each EIC class
5 member possess the same interest in recovering earned income tax credits and in
6 compelling the implementation of the earned income tax credit program. Petitioners and
7 each EIC class member have suffered the same injury. Additionally, no conflicts of
8 interest exist between the Petitioners and the EIC class members. The Petitioners,
9 directly and through counsel, have vigorously pursued this action on behalf of
10 themselves and the class members, as is demonstrated by the case histories, followed
11 by the submission of the instant Settlement Agreement. In its Decision and Order
12 granting Conditional Certification, the Court recognized that Petitioners claims were
13 rigorously pursued by Counsel, and that the adequacy requirement was met under the
14 circumstances. As the settlement of this matter nears completion, the parties have
15 complied with the orders the Court set forth for noticing potential members of the class to
16 ensure that the positions of individual class members are adequately and accurately
17 represented in the settlement or that dissenting class members are excluded from the
18 same. As such, Petitioners submit that the adequacy requirement for class certification is
19 met in this case.
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23 **B. Rule 23(b) criteria**

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25 Maintenance of this action as a class action is permitted pursuant to Rule
26 23(b) based upon the following: (i) the minimal interest of members of the EIC class in
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1 individually controlling the prosecution of separate actions; (ii) the extent and nature of
2 the litigation concerning the controversy already commenced by members of the
3 Petitioners; (iii) the desirability of concentrating the litigation of the claims in this Court;
4 (iv) the difficulties unlikely to be encountered in the management of this class action; (v)
5 the interest of the Petitioners and the EIC class members in avoiding inconsistent rulings
6 regarding the Respondents' conduct; (vi) the questions of law or fact common to the
7 members of the EIC Class predominate over any questions affecting only individual
8 members, and, (vii) this class action is superior to other available methods for the fair
9 and efficient adjudication of the controversy. As described above, the Court has already
10 held that common questions of law and fact predominate in this matter. The Court further
11 found that a class action is particularly suitable for this action as the individual claims for
12 members is not substantial and the individual members themselves are lower income
13 and less likely to retain counsel and assert their rights individually. For these reasons, a
14 class action is a superior method of pursuing the individual claims of class members,
15 and Petitioners have satisfied the requirements of 23(b).

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27 Page 12 of 13

28 Julie B. Santos and Charmaine R. Torres *et al.* v. Felix P. Camacho *et al.*
Civil Case Nos. 04-00006 and 04-00038

Memorandum of Points and Authorities in Support of Joint Motion of the Petitioners
in Santos and Torres for Final Certification of the EIC Class for Settlement Purposes

1 **CONCLUSION**

2 For the reasons stated herein, the Petitioners respectfully request that the
3 Court grant final certification of the EIC class for settlement purposes.

4 Respectfully submitted this _____ day of June, 2006.

6 **PHILLIPS & BORDALLO, P.C.**
7 Interim Class Counsel & Attorneys for
8 Petitioner Julie Babauta Santos

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